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No. 96-1794

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

SOON DUCK KIM, et al.,

Petitioners,

- against -

THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION

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June 17, 1997

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COUNTER-QUESTIONS PRESENTED

1. Should this Court dismiss the writ on jurisdictional grounds for lack of a substantial federal question, where the decision rests on independent and adequate state grounds -- namely, the New York Court of Appeals' interpretation of long-established principles of state law to determine the threshold question of whether petitioners even possessed a property interest for state or federal constitutional takings purposes?

2. If not, should the writ nonetheless be denied, where the decision sought to be reviewed poses no conflict regarding a substantial question of federal law that might otherwise support granting certiorari?

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JURISDICTION

Petitioners Soon Duck Kim, Man Suk Jun, and In Myung Jun ("petitioners"), incorrectly invoke the jurisdiction of this Court under 28 U.S.C. section 1257(a). As more fully explained below, the decision of the New York Court of Appeals is based solely on a ruling that petitioners had no property right recognized by state law that could be subject to an unconstitutional taking.

RELEVANT STATUTE

New York City Charter section 2904 obligates property owners to, inter alia, obey City Department of Transportation orders to "fill any sunken lot," and provides that, when property owners fail to do so, the City may perform that obligation at the owner's expense. The full text of Charter section 2904 is reproduced as Appendix E to petitioners' application.

STATEMENT OF THE CASE

Petitioners are the owners of a parcel located at 31-25 College Point Boulevard in Queens, which they purchased in 1988 (A17, ¶ 11).[1] They operate a car wash business on the property (A17, ¶ 9).

In June 1978, ten years before petitioners bought the property, the now-defunct New York City Board of Estimate had raised, from 9.1 to 13.5 feet, the legal grade of that section of College Point Boulevard (A34, ¶ ¶ 8-9). In October of that same year, a map reflecting that legal grade was then duly filed in the office of the Queens Borough President (A34, ¶ 8-9).[2]

Thus, when petitioners brought the College Point Boulevard property in 1988, their parcel was approximately

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[1] Parenthetical references refer to pages in petitioners' Appendix, filed in the Court of Appeals.

[2] The legal grade of property is its height above sea level, and, at the time in question, was established by the Board of Estimate on maps that were filed in the Topographical section of the Borough President's office in the borough where the property is located (A38, n.1).

4.5 feet short of the legal grade, a fact they had notice of by virtue of the filed map (A34, ¶¶ 8-9).

The work to raise the grade of the roadway to 13.5 feet eventually began in 1990 (A34, ¶ 10). In March 1990, prior to that work, however, the City's Department of Transportation ("DOT") gave petitioners notice of the City's intention to raise College Point Boulevard to its duly established legal grade and advised petitioners of their obligation to bring their property up to the legal grade (A34, ¶ ¶ 10-11; 43).

Specifically, the notice advised petitioners that the City sought their consent to regrade their property at no cost to them (A43). The notice stated that, if petitioners' consent was not received within ten days, they may be required either to bring the portion of the lot abutting the roadway to the legal grade at their own cost or to reimburse the City for doing it for them (A43).

The notice also gave petitioners the name and phone number of a DOT official to call if they had any questions (A43). Petitioners neither responded to the notice nor took any steps to bring their property up to the legal grade of College Point Boulevard (A35, ¶ 12).

The regrading of the road nevertheless began in June 1990 (A35, ¶ 12). Curbs were built and sidewalks were constructed with two driveways, or curb cuts, leading into petitioners' property (A41, ¶ 12). The following month, faced with the prospect of a hazard to both the stability of the roadway and public safety resulting from the nearly five-foot disparity between the illegal, lower grade of petitioners' property and the legal, higher grade of College Point

Boulevard, DOT was compelled to do what petitioners had refused to: It brought petitioners' property up to the legal grade by placing earth on that portion of the property that abutted the roadway (A40, ¶ 10).

In August and December 1990, permanent driveway ramps from College Point Boulevard to petitioners' property were built to give petitioners' property greater roadway access -- all at no cost to petitioners -- and the regrading was completed by year's end (A41, ¶ 12).

Shortly before petitioners received the March 1990 letter notifying them of their obligation to bring their property up to the legal grade, they commenced this action, asserting, inter alia, a claim that the "highest and best use" of their property has been "diminished" by virtue of the regrading project in violation of their state constitutional rights (A20, ¶¶ 25-26). Petitioners did not assert any claims against the City under the United States Constitution (A19-24). All additional claims for damages against the City were later withdrawn with prejudice (A58).

In March 1991, petitioners moved for summary judgment on their takings claim and an immediate trial on damages (A6-29). In doing so, petitioners contended that the City "took" their property because the reconstruction project was an "inva[sion]" of their parcel by the City using "super-induced earth" that rendered the property "useless" to them (A9, ¶ 5). In other words, petitioners contended that, by

bringing their property up the legal grade, the City had unconstitutionally "taken" a portion of their property.[3]

The City cross-moved for summary judgment dismissing the supposed "taking" claim (A30-51), asserting that the reconstruction project was a duly authorized exercise of the City's non-compensable police power and was required for the public safety (A33, ¶ 5, 36, ¶ 15).

OPINIONS BELOW

A. The Queens County Supreme Court's Decision

In its March 20, 1992 decision and order (one paper), the Supreme Court denied petitioners' motion for summary judgment and granted the City's cross-motion for the same relief (A4-5). Relying on Trubia v. Koch, NYLJ, Aug. 15, 1979, at 13, col. 1 (Sup. Ct. Queens Co. 1979)(n.o.r.), aff'd w/o op'n, 87 A.D.2d 742, 449 N.Y.S.2d 819 (2d Dept. 1982), which presented the same issue, the Court held that, because the City was authorized, pursuant to New York City Charter section 2904, to compel petitioners to bring their property up the legal grade, a taking claim could not be asserted against it for undertaking that obligation on petitioners' behalf at City expense (A45).

The Supreme Court also rejected petitioners' contention that this Court's decision in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) ("Loretto"),

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[3] In a subsequent reply affirmation, petitioners claimed that they were also asserting a takings claim pursuant to the Federal Constitution but that the complaint "might not have stated the issue with great clarity" (A53, ¶ 5).

required a different result because, the Court found, the government action in Loretto and the action here were "totally dissimilar" (A5). Moreover, the Court held, Loretto simply reaffirmed a long-standing rule of law and "did not announce a new legal principle which could not have been considered by the Trubia court" (A5).

B. The Appellate Division's Decision

In unanimously affirming the Supreme Court's order, the Appellate Division, Second Department, agreed that the City did not effect an unconstitutional taking of petitioners' property that required "just compensation" (A3-3[a]); 204 A.D.2d 711, 613 N.Y.S.2d 31 (2d Dept. 1994). The Appellate Division rejected petitioners' contention that bringing their property up the legal grade involved a "permanent physical invasion" of the type generally prohibited by Loretto, noting that "not every physical invasion of property is a permanent physical occupation" (A3); 204 A.D.2d 711; 613 N.Y.S.2d 31.

The Appellate Division further found that there was no "per se" taking because petitioners' rights in their property were not "effectively destroyed" (A3); 204 A.D.2d 711; 613 N.Y.S.2d 31. Noting also that petitioners did not dispute the need to bring their property up to the legal grade and that there was, moreover, no evidence that the action had any impact on petitioners' business or the use of their property, the Court ruled that no unconstitutional taking had occurred (A3[a]); 204 A.D.2d 711; 613 N.Y.S.2d 31.

C. The Court of Appeals Decision

The Majority's Opinion

In a detailed analysis of the relevant state law and New York City Charter provision, the Court of Appeals, in a 5-to-2 vote, held that "a prevailing rule of the State's property law" when petitioners purchased their property obligated them to provide lateral support to College Point Boulevard, and that obligation "encumbered" petitioners' title. 1997 N.Y. Lexis 101, at *24. The majority held that, as a result, the City's enforcement of that legal obligation did not constitute a taking of any property interest owned by petitioners. Id.

The majority's analysis squarely rested on state law principles of what constitutes a property interest, which the Court, relying on this Court's opinion in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992), called the "logically antecedent" inquiry into petitioners' property interests. 1997 N.Y. Lexis 101, at *6-7. The Court of Appeals majority undertook that analysis in light of New York's common law, which it found had been codified by Charter section 2904. Id., at *11.

Specifically, the majority first ruled that petitioners had an obligation to "preserve and maintain the legal grade" of College Point Boulevard under the State's longstanding common law. 1997 N.Y. Lexis 101, at *13. See Village of Haverstraw v. Eckerson, 192 N.Y. 54, 59, 84 N.E. 578, 580 (1908)(the Court of Appeals holding that the preservation of a highway's lateral support "is an obligation to the community which rests upon the adjacent landowner. It is an absolute right of the public . . . .").

The Court of Appeals majority then held that Charter section 2904(2) is the "specific, contemporary formulation" of that common law doctrine. 1997 N.Y. Lexis 101, at *15. In then expressly interpreting the meaning of "sunken lot" as used in Charter section 2904(2), the Court ruled that the term encompasses parcels that, like petitioners', are below the legal grade. Id. This is so, the majority held, in light of the "broad common-law obligation of lateral support to a public roadway" and "the statutory purpose of supporting the roadway and protecting it from erosion, as well as abating the substantial safety hazard posed" by the disparity between the old and new legal grades. Id., at *17.

Relying on case law applying the predecessor provision to Charter section 2904(2), the Court of Appeals majority next held that the Charter obligation is "a normal incident to the ownership of real property within the City of New York" that was in force when petitioners bought their property. 1997 N.Y. Lexis 101, at *19. Petitioners therefore acquired a "sunken lot" and with it, an obligation to raise it to the legal grade. Id., at *20. The majority stated that, had petitioners purchased the property at the legal grade, and the City thereafter raised the legal grade of the roadway, "a different takings question might be presented." Id., at *21, n.7.

The majority also held that petitioners were on notice that, if they did not comply with their Charter section 2904(2) obligation, the City would perform the work for them. The Court ruled that petitioners cannot convert their "deliberate noncompliance" with that obligation into a takings claim. 1997 N.Y. Lexis, at *20.

The Court of Appeals majority therefore held that, even assuming that petitioners had demonstrated a prima facie

takings claim, the City had "clearly discharged its burden to rebut" that case by establishing that, pursuant to the City Charter, petitioners never owned the property interest they claimed was taken. 1997 N.Y. Lexis, at *21.

Finally, the Court of Appeals majority stated, petitioners' potential lateral support obligation was apparent when the property was purchased and therefore presumably resulted in some reduction in the purchase price. 1997 N.Y. Lexis 101, at *23. Thus, permitting petitioners to prevail on a takings claim would inequitably result in a windfall to petitioners at the taxpayers' expense. Id.

The Dissenting Opinion

The dissent agreed that the City's actions here would not amount to an unconstitutional taking so long as there was a "pre-existing limitation" on petitioners' title under state law. 1997 N.Y. Lexis, at *33. It disputed, however, that state law provided such a limitation. Id.

Specifically, the dissent argued that such a pre-existing limitation "must stem from more than the conclusory assertion of a common law maxim" such as "one should not use his property in such a manner as to injure that of another." 1997 N.Y. Lexis 101, at *35-35. The dissent then contended that the majority uses a "newly expanded obligation" under that principle to "validat[e] the permanent physical occupation at issue here." Id., at 34.

The dissent also questioned the majority's ruling that Charter section 2904 is a contemporary version of the common law lateral support obligation, contending that such ruling is "certainly open to debate." 1997 N.Y. Lexis, at *35. In any

event, the dissent urged, Charter section 2904 is inapplicable, because the term "sunken lot" implies that "something has happened to the lot in question which might therefore require repair." Id., at *37-38. The dissent nonetheless acknowledged that the term is "amenable to two differing yet reasonable interpretations," one that presumably would encompass the one used by the majority. 1997 N.Y. Lexis, at *39.

Finally, the dissent argued that the common law doctrine of lateral support "restricts the withdrawal of the support of any land necessary to maintain another's land in its natural condition." 1997 N.Y. Lexis, at *40. At the same time, however, the dissent recognized that, in the case of a public roadway, "the common law obligation is extended to include the sustenance of lateral support for even an artificially created street." Id. The dissent nonetheless contended that the majority had expanded that obligation "much more broadly than any of our authorities have even seen fit to do," because the obligation does not apply where the City has created the surface disparity by raising the legal grade of the street. Id., at *42-43.

REASONS FOR DISMISSING OR DENYING THE WRIT

POINT ONE

AS THE DECISION OF THE NEW YORK STATE COURT OF APPEALS RESOLVED ONLY WHETHER PETITIONERS POSSESSED A PROPERTY INTEREST UNDER STATE LAW THAT COULD BE SUBJECT TO AN UNCONSTITUTIONAL TAKING, IT RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS AND THIS COURT SHOULD THEREFORE DISMISS THE WRIT FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION.

This Court unwaveringly adheres to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional, because, if the state law determination is sufficient to sustain the judgment, "any opinion of this Court on the federal question would be purely advisory." Lambrix v. Singletary, ___ U.S. ___, 117 S.Ct. 1517, 1522 (1997).

Thus, where a state court decision indicates with the "requisite clarity" that petitioner's claims were rejected on state law grounds, this Court is without authority to address the federal claim supposedly raised below. Sochor v. Florida, 504 U.S. 527, 533 (1992); International Longshoremen's Ass'n., AFL-CIO v. Davis, 476 U.S. 380, 387 (1986). This is

because "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide" such cases. Michigan v. Long, supra, 463 U.S. at 1040.[4]

Here, the New York Court of Appeals could not have been more forthright as to the basis of its decision. In rejecting petitioners' claim that they are entitled to compensation for an alleged permanent physical occupation of their property, the Court focused solely on the threshold analysis, under state law, "into the bundle of rights and concomitant obligations" contained in petitioners' title. 1997 Lexis 101, at *7-8.

In doing so, the Court undertook an extended analysis of the "corpus juris" of New York to identify the "background rules of State property law that inhere in an owner's title," and ruled that petitioners' "obligation to preserve and maintain the legal grade" of College Point Boulevard, as codified by Charter section 2904, "has its roots in New York's common-law obligation of lateral support." 1997 N.Y. Lexis 101, at *11-13. As authority for that proposition, the Court cited its own prior opinions in Village of Haverstraw v. Eckerson, 192 N.Y. 54, 84 N.E. 578 (1908) and Laba v. Carey, 29 N.Y.2d 302, 277 N.E.2d 641, 327 N.Y.S.2d 613 (1971), as well as the lower state court decision, Trubia v. Koch, N.Y.L.J. Aug. 15, 1979, at 13, col. 1 (Sup. Ct. Queens Co. 1979)(n.o.r.), aff'd w/o op'n, 87 A.D.2d 742, 449 N.Y.S.2d 819 (2d Dept. 1982). 1997 Lexis 101, at *13-20.

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[4] This Court does, however, assess the sufficiency of the asserted state ground. International Longshoremen's Ass'n., AFL-CIO v. Davis, supra, 476 U.S. at 387; Michigan v. Long, supra, 463 U.S. at 1038.

The Court of Appeals unquestionably never reached the federal takings issue that petitioners propose for this Court's review. Indeed, the Court never even stated whether it viewed petitioners' taking claim as arising under state or federal constitutional law, or both.[5] Moreover, the Court, having decided the matter solely on state law property principles, even declined to characterize petitioners' claim as involving either a physical or regulatory taking. 1997 Lexis 101, at *7.

Consequently, the Court's determination that petitioners' "bundle" of property rights encompassed an obligation to provide lateral support to College Point Boulevard constitutes an adequate and independent state ground for the judgment below and divests this Court of jurisdiction to hear this case.

Petitioners' writ does not, and could not, dispute that they have no protected property interest subject to a takings claim if "background principles" of state nuisance and property law prohibit them from refusing to provide lateral support to the boulevard. See Lucas v. South Carolina Coastal Comm'n., supra, 505 U.S. at 1030. Instead, the writ rests on the palpably baseless assertion that their property interests were "redefined" when Charter section 2904 was applied to them (Pet., at 9). As that claim was neither raised in, nor decided by, the state courts, it is not properly before this Court. California v. Taylor, 353 U.S. 553, 557 n.2 (1957).

In nonetheless pressing that contention, petitioners simply ignore that the Court of Appeals examined, at length,

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[5] Petitioners never even asserted a federal constitutional claim in their complaint (A19-24).

New York's well-recognized and longstanding doctrine of lateral support, which it called the common law antecedent to Charter section 2904. 1997 LEXIS 101, at *13-17.[6] That doctrine is precisely the type of state background principle that precludes petitioners' taking claim, as the Court of Appeals correctly determined. Under state law, petitioners' title never included an unfettered right to maintain an illegal grade and thereby destabilize the adjacent roadway.

Petitioners' contention that the Court of Appeals imposed a limitation on their title that did not exist "when the fee was created" (Pet., at 22), also rests on at least two insupportable propositions. First, petitioners never demonstrated when their "fee" was supposedly created, and thus, they are in no position to contend that the limitation imposed did not inhere in that fee. Second, petitioners unquestionably purchased a below-grade parcel that did not comport with Charter section 2904 and the longstanding common law doctrine of lateral support.

The existence of a unanimous body of state case law simply underscores petitioners' failure to establish a constitutional basis for their claim. A substantial federal question cannot be created by giving a constitutional gloss to routine state law disputes that can be, and in this case have been, adequately addressed by state courts. Black v. Cutter Laboratories, 351 U.S. 292, 299 (1956). As this appeal

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[6] Charter section 2904, which the Court of Appeals held was based on longstanding principles of common law, was enacted in 1977, eleven years before petitioners purchased the property in question. The predecessor provision to section 2904, former Charter section 230, was enacted in 1962, 26 years before the purchase.

presents no substantial federal constitutional question, the writ should be dismissed.

POINT TWO

ALTERNATIVELY, THE DECISION POSES NO CONFLICT REGARDING A SUBSTANTIAL QUESTION OF FEDERAL LAW, AND THEREFORE THE PETITION SHOULD BE DENIED.

Rule 10 of this Court's rules state that review of a writ of certiorari is a matter of judicial discretion that will be exercised "only for compelling reasons." Although that rule also advises that a writ may be granted if, inter alia, a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort, a United States Court of Appeals, or this Court, there is no such conflict here.

As an initial matter, the entire Court of Appeals' opinion rests solely on an interpretation of state property and nuisance law, and it therefore does not invoke, much less decide, an important federal question. In fact, where, as here, the issue involves state-created property rights, "it is appropriate to recognize that in certain instances, different states may define these rights by providing additional protection from government interference." Stupak-Thrall v. United States, 89 F.3d 1269, 1270 (6th Cir. 1996)(Nelson Moore, J., concurring), cert. denied, ___ U.S. ___, 117 S.Ct. 764 (1997).

In any event, the opinion poses no conflict that merits this Court's review. In fact, the Court of Appeals' ruling,

which rests on a holding that petitioners assumed a title that encompassed an obligation to comply with Charter section 2904 and provide lateral support to College Point Boulevard, is in harmony with decisions from both other state courts of last resort and the federal appellate courts. See, e.g., Porter v. DiBlasio, 93 F.3d 301, 310 (7th Cir. 1996)(state statute authorizing the seizure of stray animals is analogous to the state's traditional power to abate nuisances or protect the public health, and therefore state's disposal of neglected animals falls within the class of property deprivations for which the Fifth Amendment does not require compensation); Hoeck v. City of Portland, 57 F.3d 781 (9th Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 2612 (1995)(under city code in effect when plaintiff took title, plaintiff had no right to use property to maintain an abandoned structure); Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995)(state's highest court holding that landowner never had the right to fill critical area tidelands on his property because statute in existence when he purchased property in 1987 forbade it without a permit); State of Colorado v. The Mill, 887 P.2d 993, 1002 (Colo. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 2612 (1995)("the state may always restrict uses by regulation or statute when such uses previously were forbidden under common law principles"); Hunziker v. State of Iowa, 519 N.W.2d 367 (Iowa 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 1313 (1995)(state's highest court holding that denial of building permit did not constitute unconstitutional taking because plaintiffs took title to their property subject to pre-existing state regulations governing the preservation of ancient burial grounds); Stevens v. City of Cannon Beach, 317 Ore. 131, 854 P.2d 449 (1993), cert. denied, 510 U.S. 1207 (1994)(when plaintiffs took title to their land, they were on notice that, under the state's custom, they did not possess the right to exclusively use their dry sands area).

Petitioners nonetheless assert that the Court of Appeals' opinion conflicts with four state court and one federal appeals court decisions, as well as decisions of this Court (Pet., at 13-28). A review of those cases, however, demonstrates that no conflict exists.

With respect to the state court decisions, the first petitioners rely on, Vatalaro v. Department of Environmental Regulation, 601 So.2d 1223, (Fla. Dist. Ct. App. 5th Dist.), review denied, 613 So.2d 3 (Fla. 1992), is not even a decision of a state court of last resort. In any event, the Vatalaro Court never held, as petitioners suggest (Pet., at 14), that pre-existing regulations can never constitute a bar to a takings claim.

Rather, the Vatalaro Court agreed that the wetlands regulations at issue would bar a takings claim where there was a denial of a rezoning or variance application, because the property was purchased in anticipation of a discretionary rezoning application which, if denied, did not therefore affect the landowner's "bundle" of rights. 601 So.2d, at 1229. However, the Court then distinguished cases involving permit regulations, where the land is purchased "with future development legitimately anticipated and with no existing bar thereto." Id. Thus, both Vatalaro and the Court of Appeals approach the issue similarly by examining the bundle of rights a landowner acquired in light of relevant state law.

Petitioners also rely on Moroney v. Mayor, 268 N.J. Super. 458, 633 A.2d 1045 (N.J. Super. Ct. App. Div. 1993), certification denied, 642 A.2d 1004 (N.J. 1994) (Pet., at 17), another intermediate appellate decision. In contending that, in Moroney, New Jersey held that "the timing of land transfers and regulations have no relevance to constitutionally protected

ownership interests" (Pet., at 17), petitioners misrepresent the holding of that decision.

Moroney turned on the specific decisional law relating to the particular zoning provision in issue, which expressly stated that, if a property owner had the right to apply for a hardship variance when the zoning ordinance was enacted, that right passes to a successor in title. 268 N.J. Super., at 464; 633 A.2d, at 1048. Thus, the Moroney Court also examined the property owner's "bundle" of rights in light of existing state law.

Petitioners also erroneously contend that a conflict arises with K&K Construction, Inc. v. Department of Natural Resources, 217 Mich.App. 56, 551 N.W.2d 413 (Mich. App. 1996), leave to appeal granted, 562 N.W.2d 788 (Mich. 1997)(Pet., at 18-19), which is yet another intermediate state appeals court decision. That Court, however, agreed that a regulation must inhere in the owner's title and must be grounded in background principles of nuisance and property law. 217 Mich. App., at 62; 551 N.W.2d, at 417. In that particular case, however, the Court held that the constitutional provision and legislative preamble relied on by the State to establish those background principles were insufficient to carry the State's burden in this regard. 217 Mich.App., at 62-63; 551 N.W.2d, at 417-18.

The only decision of a state court of last resort cited by petitioners, Lopes v. City of Peabody, 417 Mass. 299, 629 N.E.2d 1312 (1994), stands for the wholly unremarkable proposition that, under Massachusetts law, a property owner is entitled to challenge a pre-existing land use regulation (Pet., at 15). The only issue before that Court was the plaintiff's facial challenge to the regulation, 417 Mass., at 302; 629 N.E.2d, at

1314. That principle therefore has no applicability in this matter, which raises no facial challenge whatsoever. Indeed, in language petitioners' unaccountably ignore, the Lopes Court explicitly acknowledged that "the rights of a subsequent purchaser to takings damages might well stand in a posture significantly different from that of one seeking to have a zoning provision invalidated." 417 Mass., at 303, n.8; 629 N.E.2d, at 1317, n.8. The Lopes decision therefore cannot pose any conflict worthy of this Court's review.[7]

Applying similarly fanciful legal analysis with respect to the federal case, petitioners assert that a conflict arises with Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996), because, they claim, Preseault holds that "rights of owners of land are defined when the property interests are created and not by subsequent legislation or regulations" (Pet., at 20). In fact, as another court has noted, Preseault "merely presented the question of whether federal legislation passed subsequent to the creation of a property right inhered in the title owned by the Preseaults." Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545, 582 (Ct. Cl. 1997). That poses no conflict with the decision of the Court of Appeals, however, because, as the Court of Appeals correctly determined, petitioners bought a parcel that was five feet short of the previously established legal grade, and therefore their title encompassed the obligation to bring the property into conformity with the legal grade

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[7] In fact, as petitioners concede in a footnote (Pet., at 17, n.41), Massachusetts recognizes that, where a purchaser acquired property in a designated flood plain that was subject to established restrictions on building, the purchaser "may not complain about the loss of a right she never acquired." Leonard v. Town of Brimfield, 423 Mass. 152, 155, 666 N.E.2d 1300, 1303, cert. denied, ___ U.S. ___, 117 S.Ct. 582 (1996).

pursuant to the common law doctrine of lateral support and Charter section 2904.

In a pique of circular and self-serving reasoning, petitioners also argue that the Court of Appeals opinion conflicts with the well-established doctrine that physical takings require just compensation (Pet., at 23-24). As the Court of Appeals held simply that petitioners possessed no property interest that could be unconstitutionally taken, and never even ruled whether the facts posed a regulatory or physical taking, no such conflict arises.

In any event, there was no physical taking here. Petitioners retained complete control over, and ownership of, their property, and could continue to use it as they wished so long as the lateral support for the road was maintained. Indeed, they could have performed the requisite work to their own esthetic specifications, but elected not to do so. See Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S., at 440, n.19 (this Court stating that "a different question" would be presented if the landlord owned the cable TV installation, because ownership "would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. . . . The landlord would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, and other effects of the installation.").

Petitioners' assertion also erroneously presumes the existence of a compensable property interest under state law, which, as Point I demonstrates, petitioners never established. Petitioners further claim that a physical invasion always involves a compensable taking, but even permanent physical occupations are subject to the Lucas antecedent inquiry

analysis. Lucas v. South Carolina Coastal Council, supra, 505 U.S. 1028-29 (this Court stating that it "assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation on the landowner's title" [emphasis in original]).

Nor does a footnote in the Court of Appeals' decision conflict with Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), as petitioners assert (Pet., at 27). In Nollan, this Court held that the state commission could not implement a policy that exacts a beachfront easement in exchange for a building permit, even though the landowners knew of that policy when they acquired the property.

As the Court of Appeals correctly reasoned, that Nollan footnote must be harmonized with the logically antecedent analysis subsequently announced in Lucas. 1997 N.Y. Lexis, at *12, n.3. Thus, the Court of Appeals, relying on authoritative commentary, ruled that Nollan should not be read as to prohibit an inquiry into statutory or regulatory restrictions. 1997 N.Y. Lexis, at *12, n.3. That analysis is wholly consistent with the body of state and federal law referred to above.

Petitioners also misrepresent the holding of the Court of Appeals in order to try to make their point. The Court never held, as they claim (Pet., at 27), that the City could acquire an easement without paying just compensation. As the decision plainly states, the Court interpreted New York's common law and held that petitioners' title never encompassed a right to create a public hazard by maintaining their parcel below the duly established legal grade. 1997 N.Y. Lexis, at *13-20.

Similarly, petitioners' dire predictions about how the Court of Appeals would have decided Nollan or might decide another takings case (Pet., at 27), simply demonstrates that petitioners have no substantial federal issue to present to this Court. This is only underscored by petitioners' invocation of a litany of supposed unconstitutional infringements that will allegedly take place if certiorari is not granted (Pet., at 28).

Thus, petitioners have wholly failed to raise a conflict involving a substantial federal question that merits this Court's review, and their writ, if not dismissed for want of jurisdiction, should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DISMISSED OR, ALTERNATIVELY, DENIED.

Respectfully submitted,

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